PUBLIC PROSECUTOR

v.

HAN KONG JUAN & ORS.

HIGH COURT MALAYA, PENANG
GUNN CHIT TUAN J
[CRIMINAL TRIAL NO. 9/82]
23 SEPTEMBER 1982

CRIMINAL LAW AND PROCEDURE: *Charge - Trafficking in heroin - Three accused - Common intention - Statement recorded from 1st accused - Question of voluntariness - Allegation of interrogation and oppressive questioning.*

CRIMINAL LAW AND PROCEDURE: *Trial within a trial - Onus on prosecution to satisfy statement was made voluntarily - Prosecution to prove voluntariness before caution was administered.*

CRIMINAL LAW AND PROCEDURE: *Agent provocateur - No statement recorded - Effect - Evidence of - Whether unworthy of credit - Whether defence of entrapment applies under Malaysian law - Section 112(i) Criminal Procedure Code.*

CRIMINAL LAW AND PROCEDURE: *Informer - Not subpoenaed - To appear in Court - Effect - Whether his evidence unfavourable to prosecution - At close of prosecution case, charge was amended against 1st and 2nd accused - Words referring to "common intention" deleted, 1st accused charged for trafficking on his own behalf, 2nd accused for abetting the 1st accused, 3rd accused acquitted and discharged.*

The three accused persons were charged for trafficking in a dangerous drug, to wit, 1664.3 grammes of heroin, in furtherance of the common intention of all, on their own behalf on 6 July 1978, at about 11.20 p.m., at Hotel Malaysia, Penang, in contravention of the provision of para. (a) of subsection 39B (1) of the Dangerous Drugs Act No. 30/52 (Revised 1980) and punishable under s. 39B(2) of the said Act, read with s. 34 of the Penal Code. All the three accused claimed trial to the charge.

The prosecution's first witness was a U.S. special undercover agent from the Drug Enforcement Administration of the U.S. Dept. of Justice (PW1) who told the Court that the first occasion he met 1st accused was in Singapore on 27 June 1978 and three times where they discussed the possibility of purchasing 50lbs of heroin and agreed that the transaction would take place in Penang. PW1 came to Penang on 30 June 1978, but before that he informed DSP Charlie Khoo (PW8), the OC. of the Anti-Narcotic Bureau for assistance. PW1 met the accused again on 2 July 1978 at room 602, Hotel Malaysia, Penang in the presence of his informer when PW1 showed the 1st accused RM95,000 meant for the purchase of the heroin. After several meetings with the 1st accused PW1 for the first time met the 2nd accused on 5 July 1978 at room 602 of the said hotel who confirmed that they had the heroin for sale. On 6 July 1978 at 10.30 p.m. the 1st accused informed PW1 that the heroin would be delivered and asked the informer to go along with him to get the heroin. PW1 told the 1st accused that he would return to his hotel room to collect the money and 10 minutes later received a telephone call that the informer had picked up the heroin and that the 2nd accused was in a street nearby. PW1 immediately informed DSP Charlie Khoo (PW8) who was in a room at the same hotel. At 12.20 p.m. PW8 informed PW1 that he had arrested the 1st and 2nd accused and several other people. The 1st accused was arrested in room 602 of the Hotel by ASP Cheok (PW2) where a brief case containing eleven packets of heroin was found.

At about 11.25 p.m. that same evening ASP Ramalingam (PW3) who was on duty in the vicinity of Hotel Malaysia arrested the 2nd accused and Insp. Razak (PW4) later detained the 3rd accused at the Garden Inn Hotel. The eleven packets of heroin taken from room 602 by PW2 were sent to the chemist who found them to contain 1664.3 grammes of heroin.

During the trial, when the prosecution sought to produce a statement recorded from the 1st accused there was objection from Counsel and a trial within a trial was held to determine the admissibility of that document under s. 37A of the Dangerous Drugs Act. Counsel pointed out that the statement was recorded at night and that it took the recording officer (PW10) five hours to type out five pages of that statement. He contended that it was an interrogation and was oppressive. During the second trial within a trial, the learned DPP withdrew his application to produce the cautioned statement of the 2nd accused. A third trial within a trial was also held after Counsel had objected to production of a statement recorded from the 3rd accused.

After conclusion of the prosecution case, defence Counsel submitted that there was no case to answer in respect of all the three accused. He said that PW1 had not given a statement to the Investigating Officer and referred to s. 112(i) of the Criminal Procedure Code which was not complied with. Counsel also raised the point that PW1 was an agent provocateur and referred to s. 40A of the Dangerous Drugs Act 1952. Counsel further said the Court should presume, in accordance with s. 114(g) of the Evidence Act, 1950 that the evidence of the informer, would be unfavourable to the prosecution if he had been subpoenaed to appear in Court.

The words "common intention" appearing in the charge against the 1st and 2nd accused were deleted and the charge was amended to read that the 1st accused did on his own behalf traffic in a dangerous drug, to wit, 1664.3 grammes of heroin and the 2nd accused was charged for abetment of the commission of the offence of trafficking in a dangerous drug by the 1st accused. The 3rd accused was acquitted and discharged without his defence being called.

Both the 1st and 2nd accused gave evidence on affirmation and denied that the meetings with PW1 was to negotiate the sale of heroin and also denied all the allegations that were made against them by the prosecution witnesses. Their defence was that there were negotiations for the sale of a horse belonging to the 2nd accused.

Held:

[1] Having heard and considered the evidence of the first trial within the trial, the Court was satisfied beyond reasonable doubt that the 1st accused's statement was made voluntarily and was not made as a result of any inducement, threat or promise or of oppressive questioning. In the circumstances, the Court held that his cautioned statement was admissible and allowed the prosecution to produce it as an exhibit.

[2] As to the cautioned statement of the 3rd accused, the Court considered it to be unsafe to admit it as it appeared that it had been taken under circumstances which would amount to sufficient inducement by the recording officer, who was a probationary Inspector in 1978, to deprive the statement of its voluntary character.

[3] PW1, an agent provocateur, should not be presumed to be unworthy of credit by reason only of his having abetted the commission of an offence by the accused persons under s. 39B of the said Act in this case because his abetment was for the sole purpose of enabling the police to secure evidence against those persons. The Court therefore declined to draw the presumption that PW1, whose evidence had already been accepted by the Court was unworthy of credit.

[4] There was no reason why the Court should exercise its discretion to refuse to admit, or having admitted, to exclude the evidence of PW1 as, the prejudicial effect of PW1's evidence in this case did not outweigh its probative value. There is also no place in Malaysian law, as in English law, for a doctrine which would allow a so-called defence of entrapment.

[5] Having considered the evidence adduced, including the 1st accused's retracted cautioned statement, the Court found that the prosecution with the aid of the presumptions under s. 37(d) & (da) of the Dangerous Drugs Act 1952 had made out a case against the 1st accused which if unrebutted would warrant his conviction. The 3rd accused was acquitted and discharged without being called upon to enter on his defence as the Court found that no case was made out against the 3rd accused which if unrebutted would warrant his conviction.

[6] As the Court amended the charge against the 2nd accused for abetment of the commission of the offence of trafficking in dangerous drugs by the 1st accused, the Court therefore proceeded to amend the charge against the 1st accused by deleting the words referring to "common intention."

[7] The Court did not find that the 1st accused and 2nd accused had on the balance of probabilities cast any doubts on the truth of the prosecution's case about the negotiations for the sale of drugs. Although the Court did not believe the defence of both accused persons, it also did not consider that it might reasonably be true or was consistent with their innocence and therefore found them guilty of the respective offences for which they were charged.

[1st and 2nd accused found guilty, convicted and sentenced to death. 3rd accused acquitted and discharged without his defence being called.]

Cases referred to:
Director of Public Prosecution v. Ping Lin [1975] 3 All ER 175
R. v. Prager [1972] 1 All ER 1114
R. v. Priestley [1965] 51 Cr App Rep 1
Sarwan Singh v. State of Punjab [1957] AIR SC 637
Poon Heong v. Public Prosecutor [1949] 15 MLJ 114
Putra v. Sivagnanam & Anor. [1959] 25 MLJ 259
R. v. Sang [1979] 2 All ER 1222
PP v. Gurbachan Singh [1964] 30 MLJ 141
Surif v. Public Prosecutor [1965] 1 MLJ 36
Yap Sow Keong & Anor. v. Public Prosecutor [1947] 13 MLJ 90
Osman & Anor. v. PP [1967] 1 MLJ 137

Legislation referred to:
Criminal Procedure Code (FMS Cap 6) ss. 112(i), 158
Dangerous Drug Act 1952 (Revised 1980) ss. 33, 37, (d), (da), 37A, 39B, (1), (1)(a), (2), 40A
Evidence Act 1950, s. 114 illus(g)
Penal Code, s. 34

For the three accused - Karpal Singh; M/s. Karpal Singh & Co.
For the prosecution - Abdul Hamid bin Embong, DPP

JUDGMENT

Gunn Chit Tuan J:

Han Kong Juan (the first accused), Tan Chor Kwee (the second accused) and Tan Chee Hyan (the third accused), who were defended by Mr. Karpal Singh, were charged as follows:

That you on 6 July, 1978, at about 11.20 p.m., at Hotel Malaysia, Penang Road, in the District of Georgetown, in the State of Penang, in furtherance of the common intention of all, did on your own behalf traffic in a dangerous drug, to wit, 1664.3 grammes of heroin, in contravention of the provision of para. (a) of subsection 39B(1) of the Dangerous Drugs Act No. 30 of 1952 (Revised 1980) and that you have thereby committed an offence punishable under s. 39B(2) of the said Act. read with s. 34 of the Penal Code.

All three accused persons claimed trial to the said charge and the prosecution called eleven witnesses to prove its case against them. The first witness, Steven Yui Pun Tse (PW1), a U.S. special undercover agent from the Drug Enforcement Administration of the U.S. Department of Justice told the Court that the first occasion on which he met the first accused was in Singapore on 27 June 1978. The latter was known to him as "Ah Juan". They met three times in the Republic to discuss the possibility of purchasing 50 pounds of heroin. PW1 was told that the transaction would take place in Penang. He came to Penang on 30 June 1978, but before that he informed DSP. Charlie Khoo Cheng Sye (PW8) who was then in charge of the Intelligence and Operations Division of the Anti-Narcotic Bureau and who agreed to provide him with assistance. After arrival in Penang. PW1 met the first accused on 2 July 1978 at room 602, Hotel Malaysia. PW1's informer, called Ah Sam, who is a Hongkong national, was also present at the meeting. When PW1 showed the first accused 95,000 ringgit meant for the purchase of the heroin, the first accused inspected the money and told him that his boss should be arriving soon although he did not specify the exact date.

On 3 July 1978, PW1 and his informer met the first accused again at room 602 Hotel Malaysia. At PW1's request the first accused made a phone call from the room in the presence of PW1 who also spoke to a male person on the line in Singapore. That male person then agreed to deliver half the amount of heroin earlier on the following Friday.

On 5 July 1978 at about 6.00 p.m. PW1 met the first accused again in Penang for the third time at room 602 Hotel Malaysia. It was the first time that he met the second accused who confirmed that they had the heroin for sale but could not tell him the exact date and method of delivery until he had consulted his Penang people whose identities were not disclosed to him.

When PW1 met the first accused again in room 602, Hotel Malaysia at 10.30 p.m. on 6 July 1978, the first accused informed him that the heroin would be delivered and asked Ah Sam to go along with him to get the heroin. PW1 told the first accused that he would return to his hotel room to collect the money and ten minutes after his return to his hotel room, he received a telephone call to say that Ah Sam had picked up the heroin and that the second accused was in a street nearby. He immediately went to inform DSP Charlie Khoo Cheng Sye (PW8) who was in a room in the same hotel. At 12.20 p.m. PW8 informed PW1 that he had arrested the first accused, the second accused and several other people who were not known to PW1.

DSP Khoo Cheng Sye (PW8) who co-ordinated the operations in this case resulting in the arrest of the three accused persons was kept informed by PW1 all the time after his arrival at the Merlin Hotel in Penang on 30 June 1978. On 3 July 1978 PW1 reported to him that he had spoken to Ah Juan's boss on the telephone. The telephone number was 30981 which was communicated to the Singapore Police who informed him on 6 July 1978 that the said telephone number was linked with one Steven Tan @ Tan Chor Kwee i.e. the second accused whom PW8 only saw after his arrest. PW1 had also reported to PW8 that he met Ah Juan's boss on 5 July 1978 and that the boss was about 35 to 37 years old, about 5 feet 7 inches

tall, stout and with a fair complexion and a normal hair-cut. He was also wearing a diamond-studded Rolex watch (which was not produced in Court by the prosecution). After PW1 had reported to PW8 about his discussion with the first accused about the method of delivery, PW8 told PW1 to go for what he called a room-to-room delivery or a car-to-car method of delivery. He then directed ASP Cheok (PW2) to move into room 601 Hotel Malaysia in order to effect arrest from there. He himself waited in his own hotel room for communications from PW2 on the walkie-talkie. When PW2 reported to him that two persons had entered room 602 Hotel Malaysia and that one of them was carrying a brief case, he directed PW2 to move into room 602 to effect arrest. A few minutes before that PW1 also came to PW8's room to say that his informer had confirmed that the drugs were in the room concerned. Later PW2 informed him on the walkie-talkie that he had arrested a Singaporean called Han Kong Juan i.e. the first accused and had seized a brief case (P2) containing eleven packets of heroin.

At about 11.25 p.m. that same evening ASP Ramalingam (PW3), who was on duty in the vicinity of Hotel Malaysia, also reported that he had detained a Singaporean who was wearing a diamond-studded Rolex wrist watch and that his name was Tan Chor Kwee whom both PW3 and PW8 identified in Court as the second accused. The latter was seated in a motorcar number PY 3738 which was parked near Hotel Malaysia at Farquhar Street off Penang Road at the relevant time. Another man, a Malaysian called Tan Chee Hyan, was later detained by Inspector Razak (PW4) at the Garden Inn Hotel.

Detective Sgt. Lim Tiong Guan (PW7) who accompanied PW2 to Hotel Malaysia on 6 July 1978 kept observations through the peep hole of the door of room 601. He said he could see part of the door of room 602 and the corridor and then corrected himself and added after a photograph marked Exhibit P4A was shown to him that he could see "the left wall next to door of room 602". When he noticed the left door open, he saw two male Chinese walk out of it. One of them was stout and bald-headed and was carrying a brief case similar to the one (P2) which was latter recovered by PW2 from room 602. The corridor was well lit and he could see the faces of the two men who walked towards room 602 and he identified the first accused as the stout man he saw that evening. He opened the door of room 601 slightly and saw the first accused and the other man open the door of room 602 and then enter it. He reported to PW2 and gave him the descriptions of the men concerned. A few minutes later he was requested by PW2 to follow him to room 602 and when PW2 knocked at the door, the first accused opened it. PW2 identified himself by showing his authority card and immediately after that the first accused tried to rush out of the room without saying anything. He was prevented from doing so and was made to sit on a chair in room 602 whilst PW7 guarded him and PW2 made a search of the room. PW2 found a brief case (P2) which was in a ward-robe the door of which was ajar. PW2 then opened P2 in the presence of the first accused and PW7. He found eleven packets (Exhibits P3AK) in P2, ten of which were wrapped in brown paper and one in plastic. Later the first accused and the exhibits were taken to Police Head-quarters.

It was put to and denied by both PW2 and PW7 during cross-examination that there were two persons in room 602 when they knocked on the door and that the person who wanted to rush out was the other person and not the first accused. PW7 also confirmed that it was the first accused whom he saw carrying P2 and denied under cross-examination that P2 was already in room 602 when the first accused and the other person went into it. Having seen and heard PW2, who was not discredited, give his evidence during examination-in-chief and cross examination, I accepted his evidence and found that he was a witness of truth. As regards PW7, who was recalled for cross-examination after three defence witnesses had given

their evidence on affirmation, I found that he was rather inaccurate and inconsistent in his evidence. He said under further cross-examination that he "could see the corridor but not the door of room 602". But he said later during the further cross-examination that he "could see part of door of room 602". At the request of defence Counsel, I went to room 601 of Hotel Malaysia and in the presence of the learned deputy, learned defence Counsel, the first and the second accused person, I looked through the peep-hole of room 601 and found that one could only see the corridor and the wall but not the door of room 602. I therefore scrutinised carefully PW7's evidence again as I had found him to be rather inconsistent in his evidence regarding his ability to see the door of room 602 through the peep-hole of the door of room 601. Nevertheless I was satisfied beyond reasonable doubt that the rest of his evidence, which was confirmed by the evidence of PW2, should be accepted as truth by the Court.

The investigating officer, Inspector Razak (PW4) sent the brief case (P2) and the eleven packets therein (Exhibits P3AK) to the chemist through ASP Cheok (PW2) on 10 July. At about 5 p.m. on that day, PW2 collected back the said exhibits and received six copies of the chemist report (P6) in which the chemist had certified that on examination of the contents of the eleven packets he found them to contain a total of 4,406.6 grammes of brownish coloured granular substances which is equivalent to 1,644.3 grammes of heroin. Copies of the said chemist report have been served on the three accused persons who have acknowledged receipt on the back of Exhibit P6 (P7AC). PW4 also took possession of the first accused's passport (P8) in which there is an indorsement by the Immigration Department to show that he had entered Malaysia at Bayan Lepas, Penang, on 1 July 1978. PW4 also took possession of an international and a restricted passport (Exhibits P9A & B) from the second accused and in Exhibit P9B there is an indorsement by the Immigration authorities to show that he was allowed to enter Malaysia at Bayan Lepas, Penang, on 5 July 1978, that is, the same day PW1 met the second accused for the first time in room 602 at Hotel Malaysia. There is also a copy of a passenger manifest (Exhibit P11) which PW4 obtained from the airport authorities and in it is shown that the second accused left the Republic of Singapore on a MAS flight for Penang on 5 July 1978.

However, when the prosecution sought to produce a statement recorded from the first accused there were objections from Counsel and a trial within a trial was therefore held to determine the admissibility of that document under s. 37A of the Dangerous Drugs Act. After close of the case for the defence in that trial within a trial, Mr. Karpal Singh referred to *Director of Public Prosecution v. Ping Lin* [1975] 3 All ER 175 in which case the House of Lords held that where an objection was raised in criminal proceedings to the admission of an alleged confession by the accused, the onus was on the prosecution to satisfy the Judge beyond reasonable doubt that the statement in question had been made voluntarily by showing that it had not been obtained either by fear of prejudice or hope of advantage excited or held out by a person in authority. The Judge had to determine the issue as one of fact and causation, i.e. whether the Crown had proved that the statement had not been made as a result of something said or done by a person in authority. It was not sufficient for the Crown to show that the person in authority had not intended to extract a confession or that there had been no impropriety on his part; what was necessary was to show, as a matter of fact, that the statement in question had not been obtained in consequence of something said or done by him which amounted to an express or implicit threat or promise to the accused. Counsel submitted that it was therefore for the prosecution to prove the voluntariness before the caution was administered. He pointed out that the statement of the first accused was recorded at night and that it took the recording officer five hours to type out five pages of

the statement. It was his contention that it was an interrogation and was oppressive and he referred to *R. v. Prager* [1972] 1 All ER 1114, 1119 in which case the U.K. Court of Appeal held that in order to establish that a confession is not voluntary in that it was obtained by 'oppression', it must be shown that it was obtained in circumstances which tended to sap, and did sap, the free will of the suspect. 'Oppressive questioning' may be described as questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears or so affects the mind of the suspect that his will crumbles and he speaks when otherwise he would have remained silent. The decision of that Court was in fact to be found in the following dictum of Sachs J in *R. v. Priestley* [1965] 51 Cr. App. Rep 1 where he said:

> ... to my mind, this word in the context of the principles under consideration imports something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary ... whether or not there is oppression in an individual case depends upon many elements. I am not going into all of them. They include such things as the length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused person has been given proper refreshment or not, and the characteristics of the person who makes the statement, what may be oppressive as regards a child, an invalid or an old man or somebody inexperienced in the ways of this world may turn out not to be oppressive when one finds that the accused person is of a tough character and an experienced man of the world.

Counsel referred to the evidence of Inspector Yap Seng Hock (PW10) who recorded the cautioned statement of the first accused and contended that there was oppression. He pointed out that the statement could have been taken under fairer conditions and stated that time to reflect should have been given to the first accused and referred to the Indian case of *Sarwan Singh v. State of Punjab* [1957] AIR SC 637 in which case it was held *inter alia* that it would be difficult to lay down any hard and fast rule as to the time which should be allowed to an accused person in any given case before recording his confession. However, speaking generally, it would be reasonable to insist upon giving an accused person at least 24 hours to decide whether or not he should make a confession, even longer period may have to be given to him before his statement is recorded.

Lastly, Counsel referred to *Poon Heong v. Public Prosecutor* [1949] 15 MLJ 114, 115 in which case the former Court of Appeal had held that as the applicant in that case had not been properly cautioned, his statement should not have been admitted in evidence at the trial. In that case, it was argued by Federal Counsel that even though the caution had not been administered in the form prescribed, it was sufficient because the relevant Regulation had provided that words "to the like effect" could be used. The former Court of Appeal agreed with Spenser Wilkinson J in the case of *PP. v. Lee Weng* Raub Cr. Trial No. 3/49 (unreported), in which a similar point arose, that in order to be "to the like effect" the caution prescribed must be administered in full although it is not essential to be exactly the precise form prescribed. Counsel stated that if the Court accepted the evidence of the first accused in particular his assertion that he was never cautioned by Inspector Yap, then it must reject the cautioned statement.

The learned Deputy stated that he agreed with the learned defence Counsel regarding the principles of law which should be applied by the Court in considering the facts of this case and in deciding the admissibility of the first accused's cautioned statement. He however referred to the evidence of Inspector Razak (PW4) who told the Court that he asked the first accused the question "Awak mahu cakap?" and the first accused replied "Yes". He also pointed out that the first accused's statement was not taken until the next day after his

arrest and he referred to the unreported judgment of Azmi J in *Ng Seh Kiah & Anor. v. Public Prosecutor* Federal Territory Cr. Tri. No. 7 & 8/1978 where His Lordship considered that no adverse inference should be made in that case because the statement was recorded at night; and the fact that it took the recording officer, who was independent of the investigation, about six hours to complete the recording of the statement also showed that the statement could not have been concocted as suggested by the accused in that case. The learned Deputy pointed out that Inspector Yap was independent and not a member of the arresting team and he had administered the caution in Hokkien with words to the like effect as the caution in the English language. On the credibility of the accused, the learned Deputy pointed out that there could have been no mee or tea shops open at that time of the night when the statement was recorded and in any case Inspector Yap was not cross-examined specifically on the allegations of the first accused that he was provided with prawn mee and tea by the recording officer. As regards the allegation of assault by the first accused, it was the contention of the learned Deputy that it was not the truth and was mere fabrication. He stated that no official complaint was received and urged the Court to decide this case on the facts and after having seen and observed the witnesses.

It is settled law that where the voluntariness of an alleged confession is in issue, it is up to the prosecution during a trial within a trial to prove beyond reasonable doubt that it was voluntary by showing that the statement in question had been made without any inducement, threat or promise by a person in authority and that in the case of a statement made by a person after his arrest, the caution was administered to him in words provided in the relevant statute or words to the like effect. In this case, having heard and considered the evidence of the first trial within the trial I was satisfied that the cautioned statement was not made as a result of any inducement, threat or promise to the first accused. The first accused in answer to Inspector Razak (PW4) had intimated that he was willing to speak and his statement was recorded by Inspector Yap (PW10) who is an officer of some years' experience and who was not connected with the investigation of the case or with his arrest. The cautioned statement was recorded about 24 hours after the first accused's arrest and as he was willing to make the statement, Inspector Yap proceeded to do so that night soon after his arrival in Penang. PW10 agreed under cross-examination that it was not fair to record the first accused's statement until 4.15 a.m. but he explained that he did not know that he would take so long to record the statement when he first started to record it. He was cross-examined at length and having seen and heard him in the witness box I had no reason to doubt that he was telling the truth when he said that he never offered the first accused any mee, tea or cigarettes as he considered that that would be an inducement. PW10 conceded during cross-examination that he did ask the first accused some questions but denied that he was interrogating him. He clarified during re-examination that he only asked the first accused questions for the purpose of clarifying points raised in his statement. On the other hand, I did not consider or find the first accused to be a witness of truth. He gave his evidence in a rather flippant manner and smiled intermittingly as he answered questions in cross-examination. He gave one the impression that he thought that it was rather funny that the learned Deputy should ask him questions in cross-examination on his answers in examination-in-chief which were obviously lies. Thus, to give one example, he claimed he was offered cigarettes by PW10 who, he said, lighted them for him. He replied in answer to another question by the learned Deputy that he could not remember where PW10 got the lighter from and when challenged that he was telling lies as Inspector Yap did not smoke he merely answered in an unconcerned manner that the was not lying and would not known that Inspector Yap was a non-smoker.

As pointed out above, having considered the evidence of the first trial within a trial, I was satisfied beyond reasonable doubt and found as a fact that the first accused's statement was not obtained in consequence of what has been said or done to him which would amount to an express or implicit inducement threat or promise. I was also satisfied and found that the will of the first accused, who appeared to be an experienced man of the world, had not crumbled as a result of oppressive questioning and that he did in fact give his statement voluntarily to Insp. Yap (PW10). In the circumstances, I therefore held that his cautioned statement was admissible and allowed the prosection to produce it as Exhibit P12.

During the second trial within a trial, the learned deputy withdrew his application to produce the cautioned statement of the second accused. A third trial within a trial was also held after Counsel had objected to production of a statement recorded from the third accused. Having heard the evidence of both the prosecution and the defence during that third trial within a trial, I considered that it would be unsafe to admit the statement of the third accused as it appeared that it had been taken under circumstances which would amount to sufficient inducement by Insp. Tang (PW11), who was a probationary inspector in 1978, to deprive the statement of its voluntary character.

After conclusion of case for the prosecution, Mr. Karpal Singh submitted that there was no case to meet in respect of all the three accused persons. He pointed out the PW1 had not given a statement to the investigating officer and referred to a dictum of Rigby J (as he then was) in *Putra v. Sivagnanam & Anor*. [1959] 25 MLJ 259, 260 rhc where His Lordship had said that the "vital importance of recording statements from potential witnesses to a crime or accident at the earliest possible opportunity is so elementary that it should require no further emphasis". Counsel then referred to s. 112(i) of the Criminal Procedure Code (FMS. Cap 6) which is as follows:

> A police officer making a police investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.

He contended that there was non-compliance with the provisions of the above-quoted section of the Criminal Procedure Code. With respect, I considered that the provisions of that section only makes it mandatory for a police investigator to reduce into writing any statement made by a person who has been examined orally by him under Ch. XIII of the said Criminal Procedure Code. It follows, in my view, that if a person has not been examined orally under that Chapter by a police investigator, then there could be no queston of any written statement from him which has to be recorded. In any case the investigating officer has explained that the reason why no statement was recorded from the U.S. special under-cover agent (PW1) was because even he did not know about the existence of that under-cover agent until a few days before the trial. Counsel next raised the point that PW1 was an agent provocateur and stated that the Court would have to consider s. 40A of the Dangerous Drugs Act 1952 which reads as follows:

> Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under s. 39B or regulations made thereunder if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.

Having considered the provisions of the above-quoted section I considered that PW1 should not be presumed to be unworthy of credit by reason only of his having abetted the commission of an offence by the accused persons under s. 39B of the said Act in this case because his abetment was for the sole purpose of enabling the police to secure evidence against those persons. I therefore declined to draw the presumption that PW1, whose evidence had already been accepted by the Court, was unworthy of credit.

Counsel then referred to *R. v. Sang* [1979] 2 All ER 1222. In that case the House of Lords had ruled that as part of a Judge's function at a criminal trial was to ensure that the accused received a fair trial according to law, the Judge always had a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighed its probative value. The House also held that because the Court was not concerned with how evidence was obtained but merely with how it was used by the prosecution at the trial, a Judge had no discretion, except in the case of admissions, confessions and evidence obtained from the accused after the commission of the offence, to refuse to admit relevant admissible evidence merely because it had been obtained by improper or unfair means. If evidence against the accused had been improperly obtained by the police by the use of an agent provocateur or by a policeman and an informer inciting the accused to commit the crime alleged that was not a ground on which the Judge could exercise his discretion to exclude the evidence. Mr. Karpal Singh then asked the Court to exercise its discretion to exclude PW1's evidence. With respect again and applying the principles enunciated by the House of Lords in that case, I saw no reason why the Court should exercise its discretion to refuse to admit, or having admitted, to exclude the evidence of PW1 as, in my opinion, the prejudicial effect of PW1's evidence in this case did not outweigh its probative value. With respect, I would follow their Lordship's Judgment and hold that there is also no place in Malaysian law, as in English law, for a doctrine which would allow a so-called defence of entrapment.

Another contention of Mr. Karpal Singh, after reference to *PP. v. Gurbachan Singh* [1964] 30 MLJ 141, was that the evidence of PW1 should be subjected to the closest scrutiny and corroborated in material particulars before it could be accepted. As in *Gurbachan Singh's* case, I did not consider that PW1 was an accomplice but I agreed with Counsel that his evidence should be subjected to the closest scrutiny and that the Court should look for corroboration in material particulars before the Court accepted his evidence. But I did not agree with Counsel that the Court ought to presume, in accordance with s. 114(g) of the Evidence Act, 1950, that the evidence of the informer, a Hongkong national whose name has been disclosed as Ah Sam, would be unfavourable to the prosecution if he had been subpoenaed to appear in Court. Finally, Counsel asked the Court to place very little weight on the cautioned statement of the first accused (P12). He referred to *Surif v. Public Prosecutor* [1965] 1 MLJ 36 in which case the Federal Court had held that the confession of one accused can only be used to support other evidence against another accused. Counsel also referred to *Yap Sow Keong & Anor. v. Public Prosecutor* [1947] 13 MLJ 90 in which the Court of Appeal had held that an accused can be convicted on his own confession even when it is retracted if the Court is satisfied of its truth and it is not necessary there should be corroborative evidence to support it.

The learned deputy, on the other hand, stated that the first accused was in custody and control of the brief case (P2) when the police personnel (PW2 & PW7) entered room 602. He also referred to the evidence of the U.S. special undercover agent (PW1) and pointed out that his evidence had been tested under cross-examination and was not seriously contested

by the defence. He also referred to the evidence of DSP Charlie Khoo (PW8) which corroborated the evidence of PW1. As regards the second accused the learned deputy referred to s. 33 of the Dangerous Drugs Act 1952 (Revised 1980), which is as follows:

> Any person who abets the commission of, or who attempts to commit, or does any act preparatory to or in furtherance of the commission of, any offence under this Act shall be guilty of such offence and liable to the punishment provided for such offence.

He also referred to s. 158 of the Criminal Procedure Code (FMS. Cap 6) which allows the Court to alter or add to any charge at any time before judgment is pronounced and applied to the Court to alter the charge against the second accused. As regards the cautioned statement of the first accused (P12) which he has retracted, the learned deputy referred the Court to *Osman and Anor. v. PP.* [1967] 1 MLJ 137 in which case the Federal Court has held that an accused person can be convicted on his own confession even if it is retracted if the Court is satisfied of its truth. He submitted that the statement of the first accused was true as it was so detailed that it could not have been concocted by the recording officer. Finally, he conceded that there was not much evidence against the third accused.

Having considered the evidence adduced, including the first accused's retracted cautioned statement (P12), that is the first four pages up to line 54 on p. 4 including the words "but he asked me to wait a short while." of which I was satisfied of its truth, I found that the prosecution with the aid of the presumptions under s. 37(d) & (da) of Dangerous Drugs Act 1952 had made out a case against the first accused which if unrebutted would warrant his conviction. As I intended to amend the charge against the second accused, I therefore proceeded to amend the charge against the first accused by deleting the words referring to "common intention". The following amended charge was then read and explained to the first accused:

> That you on 6 July 1978 at about 11.15 p.m. at Hotel Malaysia, Penang Road, in the District of George Town in the State of Penang did on your own behalf traffic in a dangerous drug, to wit, 1664.3 grammes of heroin, in contravention of the provisions of para. (a) of s. 39B (1) of the Dangerous Drugs Act 1952 (Revised - 1980) and that you have therby committed an offence punishable under s. 39B(2) of the said Act.

He claimed trial to the amended charge and indicated through his Counsel that he did not want to recall any of the prosecution witnesses for further cross-examination at that stage. In the case of the second accused, I found that there was a case made out against him on the following amended charge:

> That you on 6 July 1978 at about 11.15 p.m. at Farquhar Street, off Penang Road, in the vicinity of Hotel Malaysia, in the District of George Town in the State of Penang, abetted the commission of the offence of trafficking in dangerous drug by Han Kong Juan which offence was committed in consequence of your abetment and that you have thereby committed an offence punishable under s. 33 and s. 39B (2) of the Dangerous Drugs Act 1982.

The amended charge was read and explained to him. He understood it and also claimed trial to that amended charge. As I found that no case had been made out against the third accused which if unrebutted would warrant his conviction, I acquitted and discharged him without calling him to enter on his defence.

The first accused elected to give evidence on affirmation and said that he was a fruit dealer in Singapore. He confirmed the evidence of PW1 that they had met and became acquainted in Singapore some time in June 1978. He also became acquainted with one Mr. Lee from Hongkong whose full name is Lee Chong Sam and is known to him as Ah Sam who told him

that his friend would like to buy a race horse. He informed Ah Sam that his friend had a horse in Penang. That horse was called Luperee before but was later registered as 'Roaring Thunder'. Their talks took place about one or two days before the race meetings at Penang which were scheduled for 1st and 2nd July 1978. He flew to Penang together with Lee Chong Sam on Saturday, 1 July and checked in at the Oriental Hotel whilst Ah Sam went to Hotel Malaysia. After checking in at the hotel, he proceeded to the race course with Ah Sam. The next day he went to the turf club again with Ah Sam between 12 noon and 1 p.m.

The first accused also said that on 2 July 1978 at about 8 p.m. he went to Hotel Malaysia to look for the two persons from Hongkong regarding the sale of the race horse. Whilst in room 602 in Hotel Malaysia he made a phone call to Singapore and requested the person who answered his call to request his friend Steven Tan to answer the phone. The first accused then identified the second accused as Steven Tan and said that the phone call to him was about the sale of the horse. He requested Steven Tan to come to Penang as the Hongkong men wanted to look at his horse. Steven Tan came to Penang on 5 July 1978 and met the two Hongkong Chinese at about 5 p.m that day in Hotel Malaysia. After conversation the second accused offered to take them to see the horse but as it was getting late it was decided that they should see the horse the next day. The next day he had a hangover and Ah Sam too did not turn up. So they did not see the horse. He met Steven Tan at the coffee lounge of the Garden Inn Hotel on 6 July 1978 and stayed with him there until 10 p.m. As he had previously arranged to entertain the two Hongkong Chinese to supper on 6 July 1978 he wanted to take leave of the second accused who offered to take him to Hotel Malaysia in his car. After arrival there he requested the second accused to wait for him whilst he went up the hotel to get the two Hongkong Chinese. He went up to the sixth floor and did not carry anything with him. When he got to room 602 he knocked at the door. Lee Chong Sam opened the door and asked him to sit down in the room but before he could sit down the door bell rang again and Lee Chong Sam went to open the door. He saw two strangers standing at the door. At the same time Ah Sam slipped out of the room and the two persons rushed in pointing guns at him. They said that they were policemen and asked him to raise his hands. One of them then searched him but nothing incriminating was found on him. They then searched the room and one of them opened the door of the wardrobe. PW2 found a brief case in it and asked him whose brief case it was. He said he did not know but he was handcuffed and taken away.

On 7 July 1978 the second accused and he were taken out for their statements to be recorded. He was questioned by Insp. Yap and he explained to him that he had not committed any offence as he had come from Singapore to sell a horse. He was questioned at length until the early hours of the morning and was then asked to sign a statement which was not read over to him. P12 was then shown to and interpreted to the first accused in open Court and he denied the transaction relating to heroin in the said statement (P12). He said he had signed it because the recording officer assured him that there was nothing wrong in signing it. He remembered Inspector Yap's evidence but claimed that there was no truth in what Inspector Yap had said in Court.

During cross-examination the first accused said that the first meeting with the two Hongkong Chinese was held in his shop in Queen's Street. He could not remember the date of that meeting but said that the time was between 6 p.m. and 7 p.m. His friend Doris had brought them to his shop and introduced them as businessmen. They spoke in Cantonese and Lee asked him about the sale of race horses. Doris knew that he betted on horses. Since arrival in Penang on 1 July 1978 he met the Hongkong Chinese many times but denied that there were any discussions about the sale of heroin. He agreed that PW1 in his evidence did not

mention about a horse but he did not agree that he had discussed the sale of heroin with PW1. As far as he was concerned, his dealings with the Hongkong Chinese concerned horses. When challenged by the learned deputy he denied that any money was shown to him and said that it was not true that RM95,000 was for the purchase of 20 pounds of heroin. When asked whether he had seen the registration card of the horse for sale the first accused said that he had not seen it nor did the Hongkong Chinese ask for it because they had not purchased the horse yet. He agreed with the learned Deputy that a prudent buyer should ask for particulars of the breeding of the horse and when asked by the learned deputy why he did not get the horse's registration card he merely answered "How could they ask the card from me when I am not the owner?" When he was questioned further by the learned deputy about the time he arrived at the race course on 1st July, the first accused said that there were a few races left and that he betted on a few professional and amateur races. At that stage the learned deputy displayed a card which he informed the Court was the Malayan Racing Association calendar for the year 1978. Mr. Karpal Singh objected to production of that card and I upheld his objection. The learned deputy then put to the first accused that there were no races in Penang on 1 July 1978 but the first accused still insisted that there was racing in Penang and not in Ipoh on 1 July 1978. The first accused conceded that the purchase of a horse was not a complicated matter and said that although he met the Hongkong Chinese eleven times they did not talk about the horse everytime they met and went out sight-seeing during some of the meetings. When challenged again by the learned deputy he denied that he met PW1 eleven times to negotiate the sale of heroin and that they had to meet so many times because they were not ready to deliver the heroin earlier or agree on the method of delivery. He conceded that PW2 and PW7 were strangers to him but did not know why they should have given evidence in Court against him. He said that the contents of P12 which was not read back to him were not true and he had signed it because he was told that there was no harm in signing it. He had given a statement about horses and the concoction in P12 was Insp. Yap's own version and did not represent the truth regarding him.

The 2nd accused also elected to give evidence on affirmation and said he worked in a spare parts shop in Singapore for a salary and also earned a commission. He has known the first accused for some time. The Hongkong Chinese called Ah Sam wanted to purchase a horse from him. The name of his horse had been changed from Luperee to Roaring Thunder and was trained in Penang in 1978. He met Ah Sam in Penang on 5 July 1978 in room 602 Hotel Malaysia. The time was about 5 p.m. and he was introduced by the first accused as the horse owner.

On 6 July 1978 at about 11p.m. he was outside Hotel Malaysia waiting to take the first accused out to supper. He had taken the first accused to Hotel Malaysia and was asked by him to wait whilst he went to fetch his two Hongkong friends. Whatever evidence PW1 has given implicating him is not true. He only dealt in horses and it was the first accused who had asked him to come down to Penang on 3 July 1978.

Under cross-examination the second accused confirmed that when he spoke to the first accused on the phone, he was asked by him to speak to a Hongkong Chinese whom he did not know. He was not aware that the first accused had met PW1 many times and he himself saw PW1 only once on 5 July 1978. After introduction by the first accused the subject of his horse was brought up and he offered to take them to see the horse that evening but they declined and suggested the next day. That night he and the first accused went to the Chusan night club and the next day the first accused only turned up at 9 p.m. He did not talk to the first accused the whole of that day nor did he go anywhere. He also did not

bother to talk to the buyer because there was a middleman. He agreed that he did not know PW1 before but claimed that what PW1 had said was not true. He, however, did not know why PW1 should have given evidence against him. He also did not know why the first accused had made a statement to the police.

The third accused, who was acquitted and discharged, was called as a defence witness (DW3). He said that he had known the second accused for more than 10 years and that the latter requested him by phone to fetch him at the Penang Airport on 5 July 1978. He met the second accused at about 2 p.m. to 3 p.m that day. At that time he did not know the first accused whom he met later that evening at the Chusan night club where they talked about horses and races. The next day he was with them at the coffee lounge of Garden Inn Hotel until they left at about 10 p.m. Under cross-examination DW3 admitted that he was also known as Ah Hyan and was acquitted and discharged earlier on in this case because of the lack of evidence against him. He however claimed that he had only met the first accused in 1978 and did not agree with the learned Deputy that he had known him for a long time nor would he agree with the first accused if he had said in his cautioned statement (P12) that he was his old friend. Having seen and observed this witness give his evidence, I did not find him to be a witness of truth. Thus to give an example of a contradiction in his evidence, he said in examination-in-chief that they discussed about horses and races at the Chusan night club. But during cross-examination he contradicted himself and said that he did not take part in the discussion about sale of a horse at the Chusan night club.

Another witness for the defence was Ooi Lee Wah (DW4), the wife of the second accused, who confirmed that her husband had a horse called Lupuree which was later renamed "Roaring Thunder" and transferred to Penang for training by Luke Kang in 1978. The last witness for the defence was PC. Suffian bin Mohd. Ramli (DW5), a police process server who informed the Court that he had made three attempts to serve a subpoena on Luke Kang but did not find him because the door and gate of his house was locked.

In summing up after the close of the case for the defence, Mr. Karpal Singh submitted that the defence had cast a reasonable doubt on the prosecution's case. As regards the first accused he contended that although his cautioned statement was admitted no attempt was made to impeach his credit. He pointed out that although that cautioned statement had been admitted by the Court, it could still disregard it. Counsel also stated that the Court must carefully revalue the evidence of PW7 and still urged the Court to give little weight to the evidence of PW1 as against the evidence of both the accused persons. Finally he pointed out that as regards the second accused the statement of the first accused is that of a co-accused.

In reply the learned Deputy stated that basically the case for the defence was that there were negotiations for the sale of a horse. He contended that there was no truth in the defence story. He stated that the prosecution was not disputing that the second accused owned a horse but submitted that there was in fact no negotiations with the two Hongkong Chinese for the sale of that horse. As regards the informer he stated that the prosecution did not know his real name and that in any case it was a matter of policy that informers were not subpoenaed. The learned Deputy also stated that it was not an issue whether there had been an entrapment and conceded that PW1 was an agent provocateur. He however referred once again to the evidence of PW1 who said that he met the first accused in Singapore where they had negotiated for the sale of drugs and later on he met the second accused at Hotel Malaysia for the first time on 5 July 1978. The learned deputy then referred to the evidence of both accused persons who agreed with him that the sale of a horse was not a

complicated matter and contended that negotiations would not have required eleven meetings between the parties. He also pointed out that if there were in fact negotiations for the sale of a horse, then there was no necessity for the first accused to have come to Penang as early as 1 July 1978 together with the informer. He pointed out that the prosecution witnesses were strangers to both accused persons and there were no reasons for them to tell lies in order to get them into trouble. On the other hand he pointed out that DW3 was shown to be a liar when he was cross-examined regarding the information in the first accused's cautioned statement that he (DW3) and the first accused were old friends. The learned deputy then contended that the defence was only put up the last moment and he pointed out that Inspector Yap (PW10) was not cross-examined about the sale of a horse. He pointed out that he did cross-examine the first accused about his cautioned statement (P12) which the latter had claimed was a concoction of Inspector Yap. He asked the Court to assess the evidence of the accused persons in the light of their demeanour in the witness box and stated that PW7 might have made mistakes and was not accurate in his evidence but added that there was also the evidence of PW2.

Having seen and heard the first and second accused give their evidence from the witness box I did not find both of them to be witnesses of truth. I did not believe their defence story that they were here in Penang during the relevant period in order to negotiate for the sale of the second accused's horse called "Roaring Thunder" to two Hongkong Chinese, one of whom called Ah Sam turned out to be a police informer whereas the other (PW1) was in fact a senior officer of the Drug Enforcement Administration (DEA) of the United States Department of Justice. I did not believe the first accused when he said that Ah Sam had told him that his friend would like to buy a race horse. The second accused, on the other hand, told the Court that the Hongkong Chinese called Ah Sam wanted to purchase a horse from him. Although the prosecution did not dispute the fact that the second accused owned a horse, yet the defence story that there were negotiations for the sale of a horse was not put to any of the prosecution witnesses during their cross-examination except one question to PW1 who answered that he was not aware that Ah Sam was negotiating for the purchase of a horse by him through the first accused.

Having considered the entire defence of the first and second accused, I also did not find that they had on the balance of probabilities cast any doubts on the truth of the prosecution's case about the negotiations for the sale of drugs which started in June 1978 in the Republic of Singapore and ended after careful planning on the part of the police in a trap and their arrest in Penang. Although I did not believe the defence of both accused persons, I also did not consider that it might reasonably be true or was consistent with their innocence and therefore found them guilty of the respective offences for which they were charged.

Having convicted them and after listening to the submissions of learned defence Counsel and the learned deputy, I considered that in all the circumstances of this case, including the amount of drugs involved, both accused persons should be punished with death and therefore proceeded to pass the death sentence on both of them.

Also found at [1983] 1 CLJ 245